Supreme Court, U
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

DEBRA SUSAN GALLAGHER,
Petitioner,

v.

MICHIGAN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN

PETITION FOR WRIT OF CERTIORARI

GREGORY T. ZALECKI
Counsel of Record
ZALECKI AND BAIR, P. C.
12900 HALL RD., SUITE 401
STERLING HEIGHTS, MI 48313
(586) 254-6113

Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Does a 27 month delay between arrest and trial, attributable to the prosecution's failure to timely schedule a lineup and docket congestion, violate the right to a speedy trial of a person charged with a misdemeanor?

PARTIES TO THE PROCEEDINGS

Petitioner

Debra Susan Gallagher

Respondent

The State of Michigan

Other Parties

None

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STATEMENT OF OPINIONS BELOW

None of the opinions and orders entered in this case have been published. The appendix contains copies of the unreported decisions of the 41A District Court and the Macomb County Circuit Court.

STATEMENT OF JURISDICTIONAL BASIS

Petitioner seeks review of an order denying leave to appeal entered by the Michigan Supreme Court on Sept. 29, 2003. The United States Supreme Court has jurisdiction to review on a writ of certiorari the order in question pursuant to 28 USC 1257 and 28 USC 2106.

STATUTES AND COURT RULES INVOLVED

The sixth amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 1 of the 14th amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The incident giving rise to the criminal charge against the petitioner occurred on Oct. 22, 1999. Her trial began on January 16, 2002. Petitioner filed a motion raising the speedy trial issue on June 18, 2001. The trial court denied this motion on Nov. 6, 2001. Appendix A. Petitioner timely appealed to the Macomb County Circuit Court which denied her appeal on October 1, 2002. Appendix B. She filed a timely application for leave to appeal with the Michigan Court of Appeals which was denied on February 12, 2003. She filed a timely petition for rehearing with this Court which was denied on April 2, 2003. She filed a timely application for leave to appeal with the Michigan Supreme Court which was denied on Sept. 29, 2003. Petitioner's speedy trial issue was raised and argued at all appellate levels.

Appellant was charged with the offense of OUIL – third in the 41A District Court. This offense arose out of an incident occurring on October 22, 1999. Appellant went to trial some 2 1/4 years later on January 16, 2002 on a charge of OUIL – 2nd. Prior to trial she had raised and had heard several pretrial motions referred to herein. She was convicted on January 18, 2002 by a jury. On March 26, 2002 she was sentenced. Her sentence, in part, was six months in the County jail to be followed by 12 months of house arrest.

ARGUMENT - REASONS FOR GRANTING THE WRIT

THE DELAY OF 27 MONTHS IN BRINGING THE DEFENDANT'S CASE TO TRIAL HAS DENIED HER HER RIGHT TO A SPEEDY TRIAL

The issue presented here is whether the delay of 27 months in bringing the defendant's case to trial has denied her her right to a speedy trial as guaranteed by the sixth and 14th amendments to the United States Constitution.

The defendant filed a pretrial motion to dismiss based upon a violation of her right to a speedy trial. This motion was denied on November 6, 2001. See November 6, 2001 transcript. Appendix A.

PROCEEDINGS IN THE TRIAL COURT

The incident giving rise to the criminal charge occurred on October 22, 1999. On November 4, 1999 Defendant requested that a lineup[1] be performed. The prosecutor agreed.

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[1] On July 21, 2000 defendant filed a motion to compel the completion of the agreed-upon lineup. She relied upon the following authority:

> "The areas of suggestive in court identifications and the Defendant's right to a lineup have been previously addressed by the courts. LaFave and Israel, Criminal Procedure Hornbook, 2d edition (1992), pp 372-373 provides the following discussion:
> "If a one-on-one confrontation at the police station is highly suggestive, then surely such a confrontation in court is the most suggestive situation of all, for the witness is given an even stronger impression that the authorities are already satisfied that they have the right man. As the Supreme Court declared in *Moore* vs. *Illinois* [434 US 220, 98 S Ct 458, 54 L Ed 2d 424 (1977)], where after Defendant was led to the bench for his preliminary hearing the rape victim was called upon to make her first corporeal identification of him, it "is difficult to imagine a more suggestive manner in which to present a suspect to a witness for their critical first confrontation than was employed in this case."...
> The Court did, however, mention some ways in which the suggestiveness might have been prevented had Defendant been represented by counsel. "For example, counsel could have requested that the hearing be postponed until a lineup could be arranged at which the

See Exhibits 2 and 3 which are documents filed in the trial court reflecting the prosecutor's agreement to conduct a lineup. The Defendant had been involved in a motor vehicle accident. She was arrested a short distance away from the site of the accident. The arresting officer never prepared a narrative report detailing the incident and the arrest. He had only filled out some standardized forms. (P. 80 line 10, February 1, 2001 transcript). There were at least three witnesses to the accident. They were Richard Cross, Nancy Brandow and David Brandow. See February 1, 2001 transcript and table of contents to the transcript.

The trial court scheduled multiple preliminary exam dates. However, the preliminary exam was delayed because the lineup was delayed. The lineup was to be arranged by the officer in charge. On November 4, 1999 the prosecutor signed a document contained within the court file which stated "Adj for a line up[,] D wave 14 day[;] * no obj to waive D presence if she signs something." On January 3, 2000 the prosecutor signed a document contained within the court file which stated "Adjourn for lineup[;] O.I.C to schedule."

On September 7, 2000 the trial court threatened to dismiss the case because the lineup had not been conducted. (See pp. 14 and 15 of the February 1, 2001 transcript). A lineup was eventually conducted on November 9, 2000. However, the

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victim would view petitioner in a less suggestive setting." A leading case on this point is *Evans* vs. *Superior Court* [11 Cal 3d 617, 114 Cal. Rptr. 121, 522 P 2d 66 (1974)] where the court held that due process requires the prosecution to honor a defense request for a lineup where "eyewitness identification is shown to be in material issue and there exists a reasonable likelihood of a mistaken identification which a lineup would tend to resolve.""

police department brought only one of the three witnesses[2] to the lineup. That witness was unable to identify the Defendant.

A preliminary examination was conducted on February 1, 2001. This was the first examination date which was scheduled after the lineup occurred. The court rendered a ruling on May 17, 2001 and directed the Defendant to file any pretrial motions within 30 days. She timely complied with this direction. On November 6, 2001 the trial court ruled on the motions. Defendant's speedy trial and search and seizure motions were denied.

THIS CASE SHOULD BE DISMISSED BECAUSE DEFENDANT'S RIGHT TO A SPEEDY TRIAL WAS VIOLATED

The applicable law is summarized in *Barker* v *Wingo*, 407 US 514; 92 S Ct 2182; 33 L Ed 2d 101 (1972) and *People* v *Lowenstein*, 118 Mich App 475; 325 NW2d 462 (1982). Petitioner refers to *Lowenstein* because that case is similar to hers and applies the legal principles enunciated in *Barker*. The incident providing the basis for the charge occurred on October 22, 1999 – approximately 27 months before trial - longer than the delay in *Lowenstein*.

Defendant has a right to a speedy trial pursuant to the sixth and 14th amendments to the United States Constitution. *Lowenstein* summarizes the applicable principles beginning at page 487.

Four factors must be balanced.

The first factor is the **length of the delay**. The delay was 27 months. This is longer than the delay in *Lowenstein*.

The second factor is the **reason for the delay**. The prosecutor agreed to the lineup. The lineup did not occur until

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[2] The ability of three witnesses to identify the Defendant was in issue. Of what benefit is a lineup attended by only one of three witnesses randomly selected by the police department? The two remaining witnesses have not yet been asked to identify the Defendant at a lineup.

the trial court judge threatened to dismiss the case. See pp. 14 and 15 of the February 1, 2001 transcript. Even then, the lineup was conducted with only one of the three witnesses.

The preliminary examination was conducted at the first scheduled date subsequent to the November 9, 2000 lineup. The Defendant was prepared to conduct the examination, if the trial court so decided, on all scheduled examination dates. See the affidavit attached to Defendant's trial court speedy trial brief.

The third factor is whether or not Defendant has **asserted his right to a speedy trial**. Defendant filed a specific demand on January 3, 2000. Her speedy trial motion was also such a demand. In any event, Defendant should not be penalized when the trial could not occur until after the May 17, 2001 preliminary examination ruling. The preliminary examination was a procedure that needed to be completed prior to a trial.

The fourth factor is the "**prejudice** Defendant has suffered because the case has not gone to trial." *Lowenstein* states (p. 487): "While **six months** is necessary to trigger a further investigation, a delay of **18 months** or more **shifts the burden to the prosecutor to prove that Defendant has not been prejudiced. At that point, prejudice is presumed.** " Thus the prosecutor must prove that the Defendant has not been prejudiced. The prosecutor elicited no such proof below.

On the other hand, Defendant has shown actual prejudice. A witness who was prepared to testify that the Defendant had not been drinking, or displaying any signs of alcohol intake within approximately one hour prior to the incident was having difficulty remembering the sequence of events that took place on the day of the incident, as well as the time frame of the observed period of sobriety. Although this witness is an attorney, arrangements had been made to have an alternate attorney try this case. See paragraph 7 of the affidavit

attached to defendant's trial court speedy trial motion filed on June 18, 2001and pages 25 and 26 of the 1/16/02 transcript. The Circuit Court conclusion that this issue was moot because "defense counsel admittedly could not both represent defendant and testify as a witness" is erroneous. Had the witness' memory not faded and had the prosecution not lead defendant's attorney, five days before trial, to believe that there would be no breathalyzer testimony, the alternate attorney would have tried this case. Defendant has had serious criminal charges, including potential jail time and a driver's license revocation, hanging over her head for in excess of two years. Such stress is recognized as prejudicial in *Lowenstein*.

Lowenstein further states (pp 487-489):

1) "A Defendant has **no duty to bring himself to trial**; the State has that duty; "

2) "Delays attributed to **court congestion are to be weighed against the prosecutor** rather than against the Defendant." [This is contrary to the trial judge's ruling that court congestion delays are not attributable to the prosecutor. 11/6/01 transcript, page 13.]

3) "**Unexplained delays are to be weighed against the prosecutor**."

4) "The length of delay is insufficient in of itself to require dismissal.... However, an **affirmative demonstration of prejudice is not necessary** to prove a denial of the constitutional right to a speedy trial."

It appears that some of the delays were due to court congestion or possibly unexplained. Pursuant to Lowenstein these delays are to be weighed against the prosecutor.

The speedy trial factors enunciated in Barker should be revisited by this Court. Although the factors to be evaluated are well-defined it is impossible to objectively determine in advance whether a speedy trial motion should be granted or

denied. The trial court is required to weigh all the factors and then to make what appears to be an arbitrary decision. A better formula needs to be devised to assist the trial courts in determining whether a person's speedy trial rights have been violated.

This case should be dismissed because the Defendant was denied a speedy trial. This case is a misdemeanor case. Pursuant to MCL 257.625b it should have been tried within a 77 day time frame. The 27 month delay here exceeds the 24 month delay in *Lowenstein.* The *Lowenstein* case was dismissed for violation of the Defendant's right to a speedy trial. Prejudice is presumed because the delay exceeds 18 months. The prosecutor has not disproven prejudice. On the other hand, Defendant has shown actual prejudice. The only delay attributable to the Defendant is the delay which would be caused by a reasonably prompt lineup. Defendant was reasonable in requesting a lineup and she was reasonable in insisting that the prosecutor comply with its agreement to carry out the lineup.

The prosecutor has previously argued that the delay in this case was caused by the defendant. She has used her own self-serving notes, rather than the record, to support this argument. A review of the record will not support the conclusion that the defendant was responsible for any significant delay in getting this case tried.

The record, however, supports several conclusions. It took the prosecutor more than one year to complete the agreed-upon lineup. Even then, the lineup agreement was not complied with because only one witness attended. After the November 2000 lineup, the case proceeded pursuant to the court's schedule without any adjournments (except for those sua sponte adjournments by the court of which the parties were informed by telephone). There is simply no record support for the allegation that the defendant's pretrial motions caused anything other than a nominal delay. If the prosecutor disagrees, we

would like to see **record support**, rather than references to self serving prosecution notes, in the prosecutor's brief.

When the wheat is separated from the chaff it is clear that the delay between October 22, 1999 and November 9, 2000 was caused by the failure of the local police department to conduct an agreed upon lineup. At the outset of this case the prosecutor agreed to conduct a lineup. It took more than one year for a lineup to be conducted. Even then, only one of three witnesses were brought to the lineup by the police. Simply put, the preliminary exam was not going to take place until the lineup was conducted. Thus, any procedural events taking place prior to the lineup are not relevant to determining the cause of the delay for the trial.

The prosecutor argued in the circuit court that the delay is all the defendant's fault. This argument was made by referring to the prosecutor's self-serving file notes rather than the record as required by MCR 7.212(C)(6). No trial court fact-finding supports this prosecution contention.

There was no fact-finding regarding defendant being responsible for an untimely attorney substitution. In fact, a review of the file as well as the transcript reference cited by the prosecutor in context will reveal that the court had an attorney substitution order in its hands well before February 1, 2001. Any suggestion that a delay in providing an attorney substitution order to the court caused a delay in the proceedings would be unsupported by the record and clearly erroneous.

Similarly, there has been no fact-finding that any pretrial motions by the defendant caused any significant delay. A set of motions filed before the February 1, 2001 preliminary examination caused no significant delay. As indicated above that delay was caused by the failure of the police to conduct a lineup. The next set of motions was filed by the defendant on June 18, 2001 and caused no significant delay. These motions were ultimately decided on November 6, 2001 based upon the preliminary exam transcript. There was no evidentiary hearing.

On November 6, 2001, before there was any mention of a circuit court application for leave to appeal, the trial court set a January 16, 2002 trial date. 11/6/01 transcript pp 39-41. The trial took place as scheduled. The fact that the defendant filed an application for leave to appeal and had it heard before the trial had absolutely no affect on the trial date. If the court took the time to review the motions filed by the defendant, the court would find that the motions were based upon sound factual and legal positions. This court should not short-circuit that process by falling into the trap suggested by the prosecutor of concluding that all of the motions are without merit simply because of their number. The prosecutor has provided a list of post trial motions filed by the defendant. Because those motions were filed after the trial they have no logical relevance to the issue of whether defendant was denied a speedy trial. Such a count is simply an attempt to prejudice this court against the defendant. And, of course, it looks much better for the prosecutor to have the count at 31 rather than ten. It is interesting to note that the prosecutor is even counting oral motions made on the day of trial and nonexistent motions.

The only pretrial motions requiring any significant attention by the trial court were the motions filed on July 21, 2000 and three motions filed on June 18, 2001. The remainder of the prosecutor's circuit court brief list refers to nonexistent motions (2 within the first 10), a disqualification motion granted without a hearing (the judge said he would recuse himself 2/1/01 transcript page 109 lines 5-18), an application for leave to appeal having absolutely no affect on the previously set trial date and an oral motion on the day of trial. Additionally, the prosecutor incorrectly suggests that there was an adjournment (can't tell from the brief what event was allegedly adjourned) on May 17, 2001 (the preliminary exam ruling) at the defendant's request to file additional motions and that there was an adjournment on November 6, 2001 at the defendant's request. Appellee's brief (circuit court) page 20.

The prosecution has not pointed to any fact-finding indicating that the defendant was responsible for any significant delay Both *Barker* and *Lowenstein* indicate that delays attributable to court congestion and unexplained delays are to be weighed against the prosecutor.

CONCLUSION

Petitioner requests that this Honorable Court grant her Petition for Writ of Certiorari; determine that her constitutional right to a speedy trial was violated; remand this case to the state court, if this Court deems such action appropriate; and grant any other relief agreeable to equity and good conscience to which Petitioner may be entitled.

Respectfully submitted,

ZALECKI AND BAIR, P. C.

/s/_____
GREGORY T. ZALECKI
Attorney for Petitioner
12900 HALL RD., SUITE 401
STERLING HEIGHTS, MI 48313
(586) 254-6113

APPENDIX A

Case No. 99—11649P
MOTIONS HEARING
BEFORE THE HONORABLE JUDGE
STEPHEN S. SIERAWSKI

Sterling Heights, Michigan -- Tuesday, November 6, 2001

CARL J. MARLINGA,

(P-17102)

Macomb County Prosecuting Attorney

BY: DENA KELLER,

(P-47604)

One South Main
Mt. Clemens, MI 48043
(810) 469—5350

GREGORY T. ZALECKI,

(P-27900)

12900 Hall Road - Ste. 415
Sterling Heights, MI 48313
(810) 254—6113

41-A DISTRICT COURT
STERLING HEIGHTS. MICHIGAN

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going to diminish that statement? She was--if she saw her sober at her place of employment I don't think she's going to forget that, two if not four years, if not forty years.

MR. ZALECKI: Well, the time, the time is what's important because if, if the Defendant was seen sober twenty minutes before her arrest, that's very significant. If the Defendant was seen sober three hours before her arrest, that's not so significant.

THE COURT: And again, I don't think that time frame will be in dispute. One, you've got employment records do you not,

to, to, to place her at her employment at a certain time? So you could refresh her memory with that. So the Court's not--I don't think the actual prejudice lays there.

With all that in mind, I believe the delay has been attributable to both parties and giving that assertion, or making that assertion, this Court has no problem denying your motion for speedy trial, and will proceed to the next issue.

MR. ZALECKI: Your Honor, the next motion is a motion to suppress--there's two types of evidence that we want to suppress. Evidence gathered as the result of a unreasonable seizure, and also statements; and they're tied together. A review of the transcripts shows this. There was an accident on Hall Road. It took place around where the old Montgomery Wards was, now a shoe store. The Defendant was located by Officer Mercer at Vic Tanny's. Not a long ways away, but

not

41-A DISTRICT COURT
STERLING HEIGHTS, MICHIGAN

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STATE OF MICHIGAN

IN THE DISTRICT COURT FOR THE 41-A JUDICIAL DISTRICT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff,

-vs- Case No. 99-11649P

DEBRA SUSAN GALLAGHER,

Defendant.

_____/

[attorney identification]

_____/

ORDER DENYING MOTIONS

At a session of said Court
held on 12/7/01 (est.)

PRESENT: HON._____
DISTRICT COURT JUDGE

This matter having come on to be heard on November 6, 2001; and the Court having heard argument of counsel,

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss for Violation of Defendant's Right to a Speedy Trial is denied.

IT IS FURTHER ORDERED that Defendant's Motion to Suppress, as it relates to search and seizure issues, is denied.

IT IS FURTHER ORDERED that the remaining decisions of the Court rendered on November 6, 2001 may be reduced to a court order pursuant to the Michigan court rules.

_____/s/

District Court Judge

Approved as to Form:

_____
Dena P. Keller
Assistant Prosecuting Attorney

_____
Gregory T. Zalecki
Attorney for Defendant, Debra S. Gallagher

APPENDIX B
STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

Case No. 2002-1036-AR

DEBRA SUSAN GALLAGHER,

Defendant-Appellant.

I

OPINION AND ORDER

Defendant-Appellant ("defendant") appeals from her conviction in district court on OUIL

II.

Defendant filed this appeal on March 28, 2002, from a March 26, 2002 judgment of sentenced entered in the 41A District Court by the Hon. Stephen S. Sierawski. Defendant was found guilty by jury of OUJL II on January 18, 2002, after a three-day trial. The charge stemmed from an incident of

October 22, 1999, when appellant, intoxicated, caused a three-car accident on M-59 near Lakeside Mall. Several witnesses testified as to defendant's intoxicated state, including police officers who performed a breathalyzer test at which appellant blew a .16. Defendant requests the case be resentenced, and/or the case be remanded.

Defendant forwards multiple arguments alleging errors in the trial and sentencing proceedings. Defendant first argues the sentencing judge made improper considerations at sentencing, and the sentencing order should be reversed and this case remanded before a new judge for sentencing. Defendant next argues the case should be dismissed because her right to a speedy trial was violated. Defendant further argues her previous motion to suppress should have been granted. Defendant further argues other evidence should have been suppressed. Defendant

argues legal errors were committed. The People respond that the trial court did not err at sentencing or during the trial, and,

further, any possible errors were harmless.

Sentencing. Defendant first argues the sentencing order of the district court should be reversed and this case remanded for sentencing before another judge. An appellate court shall review a trial court's exercise of discretion in sentencing, but may afford relief to the defendant only if the appellate court finds that the trial court, in imposing the sentence, abused its discretion to the extent that it shocks the conscience of the appellate court. People v Coles, 417 Mich 523, *550;* 339 NW2d 440 (1983).

Defendant raises numerous arguments related to this issue. Defendant contends the sentencing judge committed several errors at sentencing, including considering defendant's refusal to plead guilty, refusal to admit guilt, her exercise of a right to trial and to testify, considered a prior conviction previously determined to be constitutionally invalid, failed to resolve challenges to the accuracy of and considered unconvicted offenses, increased her sentence from what the

court had indicated it would be prior to the trial, failed to provide her attorney with a copy of the presentence investigation report, relied upon a presentence investigation which was not conducted in accordance with MCL 771.14, relied upon a presentence investigation report which was influenced by ex parte communications between the prosecutor and the presentence investigator, and/or sentenced the defendant to imprisonment beyond its one year maximum jurisdictional limit.

The Court has reviewed the sentencing transcript and is persuaded the sentencing court did not improperly sentence defendant. First, defendant's arguments pertaining to interpretation of the trial court's remarks are not persuasive. The Court has reviewed the sentencing judge's remarks and they reflect the court's concern that defendant has not accepted responsibility for

her actions. The Court is not persuaded that the trial court improperly based the sentence on defendant's exercising her right to trial, refusing to plead guilty or refusing to admit guilt. Similarly, the Court is not persuaded any remark by the sentencing judge prior to trial regarding the appropriate sentence evinces the trial judge punished defendant for exercising her rights to trial or refusing to admit guilt.

Second, the Court does not agree that the sentencing transcript evinces the district court based his sentence on the 1993 federal court conviction and prior unconvicted offenses. Instead, that information formed the background history. The fact of an arrest may properly be included in a presentence report. People v Potrafka, 140 Mich App 749, 752; 366 NW2d 35 (1985). The Court is not persuaded there is any basis for defendant's argument that the sentencing judge considered the current offense to be a "fifth offense" and so sentenced.[1]

Next, defendant contends that the sentencing

information was challenged which the trial court failed to resolve. In this regard, defendant argues that her challenges to the 1993 conviction and the unconvicted offenses were ignored. Again, the Court is not persuaded those challenges were ignored. The sentencing transcript reveals defendant had the opportunity to challenge the sentencing information. The record shows letters were submitted to the court testifying about defendant's character. Defendant does not assert with specificity what is inaccurate about the report.

Next defendant argues there were ex parte communications between the judge or the prosecutor and the presentence investigator. Again, defendant contends that the reasonable implication of a message from the prosecutor to the presentence investigator was that the prosecutor pressured the investigator to base his recommendation on the 1993 conviction and the

[Fn. 1] Because the 1993 federal conviction was ruled to be constitutionally infirm, the charge in the instant action was reduced from OUIL III to OUIL II by the district court.

unconvicted offenses. The Court finds this argument to be without merit; no evidence is presented that the investigator based his recommendations on pressure by the prosecutor.

Next, defendant contends that the presentence investigation was not conducted in accordance with MCL 771.14. In this regard, defendant contends the investigation was insufficient as it involved a five-minute meeting with defendant and cursorily filling out a form, and that the presentence investigator refused to meet with defendant's attorney and to review numerous documents which defendant brought with her pertaining to her rehabilitation and the validity of her 1993 federal conviction. Defendant asserts the presentence investigator's conduct indicates that his recommendation was

based upon a local sentencing policy rather than individualized facts. Defendant requests an evidentiary hearing on this issue of the application of a local sentencing policy. The Court is not persuaded defendant's assertions warrant an evidentiary hearing or suggest the presentence investigator did an insufficient investigation. The presentence investigation is not an adversary proceeding, but is rather part of the diagnostic and rehabilitative procedure; defense counsel is not required. People v Shively, 45 Mich App 658, 665; 206 NW2d 808 (1973). Again, for the reasons set forth above, the Court is not persuaded that the sentence considerations were improper; there is no evidence presented to suggest MCL 771.14 was not complied with.

Defendant next contends she must be given a copy of the presentence investigation/alcohol evaluation before sentencing. MCL 771.14 makes a presentence investigation and report a matter of right for those accused of a felony and a matter within the court's discretion for those accused of a misdemeanor. People v Smith, 423 Mich 427, 443; 378 NW2d

384 (1985). Defendant does not assert a demand for the report was made. Further, as

stated, defendant and counsel were permitted the opportunity to speak at sentencing and to provide any arguments.

Defendant next asserts the district court exceeded its jurisdiction under MCL 600.8311 when it sentenced the defendant to 18 months of confinement. In this regard, defendant argues that the six months ofjail time coupled with 12 months of house arrest constitutes 18 months of confinement, while MCL 600.8311 permits a court to sentence up to 12 months imprisonment for a misdemeanor. Defendant provides no authority for the proposition that house arrest constitutes "imprisonment." A review of case law reveals Michigan courts have not found a sentence to a tether to constitute imprisonment for purposes of probation. "Electronic tethering is not, by definition, imprisonment in the county jail, and, therefore, not a prohibited condition under [MCL 771.3(3)]. It may properly

be imposed as a condition of lifetime probation." People v Whitted, 199 Mich App 459, 460; 502 INW2d 328 (1992). The Court is persuaded that tether or house arrest should not be considered imprisonment in the current instance.

Speedy trial. 2 Defendant next argues that the delay of 27 months in bringing defendant's case to trial has denied her right to a speedy trial. A criminal defendant has a constitutional right to a speedy trial. People v Mackle, 241 Mich App 583, 602; 617 NW2d 339 (2000), citing US Const Ams VI and XIV; Const 1963, art 1, § 20; MCL 768.1. Whether a defendant was denied his constitutional right to a speedy trial is a mixed question of fact and law. People v Gilmore, 222 Mich App 442, 459; *564* NW2d 158 (1997). An appellate court reviews a trial court's factual findings under the clearly erroneous standard; constitutional questions of law are reviewed de novo. Gilmore, *459.* The Court applies a four-part balancing test in determining whether a defendant has been denied the right to a speedy trial, which includes (1) the length of

the delay, (2) the reasons for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4) prejudice to the defendant from the delay. Peotile v Cain, 238 Mich App *95,* 111; 605 NW2d 28 (1999).

If the delay is under eighteen months, the defendant must prove that he or she suffered prejudice. Cain, 112. If the delay is more than eighteen months, the delay is presumed to be prejudicial, and the prosecution bears the burden of proving lack of prejudice to the defendant. Gilmore, 459. "The establishment of a presumptively prejudicial delay triggers an inquiry into the other factors to be considered in the balancing of the competing interests to determine whether a defendant has been deprived of the right to a speedy trial." Gilmore, *459.*

The first factor involves the length of the delay. A lapse of time, alone, does not cause a court to lose jurisdiction. People v Garvin, *159* Mich App 38, 46; 406 7NW2d 469 (1987). Additionally, the length of the delay is not determinative of a speedy trial claim. Cain, 112.

The second factor questions the reasons for the delay. The time needed to adjudicate defense motions is charged to the defendant. Gilmore, 461. Delays caused by the court system are attributed to the prosecution; however, this type of delay is given a neutral tint and weighs minimally in a determination of whether a defendant's right to a speedy trial has been violated. Wickham, 111. Unexplained delays must be attributed to the prosecution. People v Atkinson, 120 Mich App 723, 733; 328 NW2d 102 (1982).

The third factor looks at a defendant's assertion of the right to a speedy trial. This has become a very important factor in the balancing test. See Wickham, 112.

The fourth factor requires prejudice to the defendant as a result of the delay. In analyzing this last factor, there are two types of prejudice, including prejudice to the person and prejudice

2 Defendant previously filed a motion to suppress based on

speedy trial and the fourth amendment seizure issue. This was heard before the Hon. Mary A. Chrzanowski, who denied defendant's application for leave to appeal in

to the defense. Gilmore, 46 1-462. An example of prejudice to the person includes an

incarceration period of the defendant. Gilmore, 462. Anxiety, in and of itself, is insufficient to establish a violation of a defendant's right to a speedy trial. Gilmore, 462. Examples of prejudice to the defense include the absence of witnesses or the fading of witnesses~ memories. Wickham, 112-113.

The trial court record presented to this Court is sparse in terms of showing filings made by either party. However, it is clear both parties made motions which delayed the trial. The trial court's "Record of Actions" reads that defendant changed attorneys, moved to suppress, moved to disqualify the judge, among other motions made. The parties agree that a corporal line-up, first requested by defendant shortly after being charged, took more than a year to occur, and had to occur before the

preliminary examination. The parties agree the line-up ultimately occurred on November 9, 2000, but was thrown out because defendant's appearance had changed (defendant had dyed her hair from blond to brown). The Court is ultimately persuaded that because there was no prejudice to defendant, her right to a speedy trial was not violated. In this regard, the Court notes that defendant was released on bond the day after being charged and remained so throughout the proceedings. Second, defendant cannot show prejudice to her defense. Defendant asserts that her counsel was a possible witness, having spoken with defendant the day of the accident, and the delay caused him to lose his memory regarding this event. Because defense counsel admittedly could not both represent defendant and testify as a witness, the Court finds this allegation moot. There are no allegations of witnesses being absent or their memories having faded. The Court finds, therefore, that there is no prejudice to defendant, and her right to a speedy trial was not violated. (See, e.g., People v Connolly,

unpublished opinion per curiam of the Court of Appeals, [Docket No. 232631, April 23, 2002], finding a delay of 18 months nonprejudicial and therefore not violative of right to speedy trial.)

Motion to suppress. First, defendant contends that her pretrial motion to suppress should have been granted because the preliminary examination transcript revealed she was arrested, confined and transported without a warrant, confined and transported without a warrant, probable cause or reasonable suspicion to believe that she committed a crime; any reasonable suspicion or probable cause came into existence after her seizure. Appellate review of grants or denials of motions to suppress evidence is made using the "clearly erroneous" standard. People v Russell, 152 Mich App 537, 540; 394 NW2d 9 (1986). A finding is clearly erroneous where, although there

is evidence to support it, the reviewing court is firmly convinced that a mistake has been made. Russell, 540.

Defendant contends that, after Officer Mercer had gone to Bally's Fitness Center to retrieve her, when the officer placed defendant in the police vehicle before driving the very short distance to the scene of the accident, she was seized at that time, before being released again, pending the continuing investigation of Officer Jobe. Defendant further contends that when defendant was placed in the vehicle for transportation, there was no probable cause to believe defendant had committed a crime, and, hence, the trial court erred in finding this was a valid Terry stop. The People respond, first, that defendant was not seized when transported back to the scene of the accident. In this regard the People maintain the officer legitimately transported her back for reasons relating to continuing the investigation, concern for defendant's safety, and concern for others because defendant's vehicle was still in the

roadway. Second, the People assert that the facts would evince a valid Terry stop.

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The preliminary examination transcript is not provided for the Court. However, the

evidence presented at trial shows that based on the facts determined at the scene (including the three-car accident itself, witnesses who indicated the direction in which defendant left, the torn clothing of defendant when found, etc.), there was reasonable suspicion to believe criminal activity had taken place, and that defendant had committed it. The Court is satisfied a Terry detention was warranted. There is no evidence presented that the trial court clearly erred in denying the motion to suppress remarks made upon Officer Mercer initially contacting defendant and statements made while in Officer Mercer's vehicle.

Accident reporting statute. The application of a statute is a task the appellate court undertakes with review de novo. People v Lounsbery, 246 Mich App 500, 505; 633 NW2d 434 (2001). MCL 257.622 requires a person involved in a traffic accident to provide information regarding his identity to a police officer. Pursuant to MCL 257.624, such statements are not admissible into evidence. Statements made not for the purpose of complying with the statute are not protected from use in a court action by the provisions of MCL 257.624. Conlon v Dean, 14 Mich App 415, 423; 165 NW2d 623 (1968).

Reviewing the record, the Court is satisfied that the officer's testimony revealed a distinction between statements made for the purpose of completing the accident report and those made extraneous to the completion of the report.

On scene identification. On review, the trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. People v Kurylczyk, 443 Mich 289, 303; 505 NW2d 528 (1993). Clear error exists when the

reviewing court is left with the definite and firm conviction that a mistake has been made. Kurylczyk, 303.

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Defendant asserts that lay witness identification of her at the scene at the time of the accident should have been suppressed. The Court is not persuaded defendant has presented evidence the identification was improper. Defendant appears to contend that the identification itself was improper if "strong evidence" did exist at the time of the initial seizure. In People v Winters, 225 Mich App 718, 727; 571 NW2d 764 (1997), the Court found the "very strong evidence" rule "inherently vague," and instead ultimately held that "it is proper. . for the police to promptly conduct an on-the-scene identification." Defendant has not forwarded any argument or evidence the identification was improper.

Reckless driving instruction. This issue presents a question of law, which is reviewed de novo. People v Connor, 209 Mich App 419; 531 NW2d 734 (Defendant contends that

reckless driving is a cognate lesser offense, if not a necessarily included lesser offense, of operating a motor vehicle under the influence of liquor. "Necessarily included" lesser offenses encompass situations in which it is impossible to commit the greater offense without first having committed the lesser. People v Hendricks, 446 Mich 435, 443; 521 NW2d 546 (1994). "Cognate" lesser included offenses are those that share some common elements, and are of the same class or category as the greater offense, but have some additional elements not found in the greater offense. Hendricks, 443. In order to require a properly requested instruction for a cognate lesser included offense, two elements must be satisfied. First, the principal offense and the lesser offense must be of the same class or category, a requirement the Courts have termed in a related context to be one of an "inherent relationship." Hendricks, 444. Second, the evidence adduced at trial "must be examined to determine whether that evidence would support a conviction of the lesser offense." Hendricks, 444.

As detailed in the misdemeanor lesser offense analysis, an inherent relationship between a greater and lesser offense requires that the two offenses - 'relate to protection of the same interests' - and - 'must be so related that in the general nature of these crimes, though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense.'" Hendricks, 445.

Here, defendant has presented no authority that reckless driving is a cognate lesser offense to OUIL. That it, she presents no authority that proof of reckless driving is necessarily presented as part of the showing of the commission of OUIL. Therefore, the Court is not persuaded the trial court was required to give an instruction on reckless driving.

Ex post **facto** clause. Defendant argues that she should not have been charged with OUIL II, because the preceding conviction was for DWI and occurred before October 1, 1999, the affective date of an amendment to MCL 257.625(23). That amendment permits that a prior driving while visibly impaired

conviction would support a current OUIL II charge. The Court does not agree that this is an ex post facto law. Michigan courts have long found that changes in the law permitting heavier penalties for a second offense are not ex post factor, nor do such amendments have a retroactive effect. This is because it is the subsequent offense that is punished more harshly, not the first. People v Miller, 357 Mich 400, 410; 98 NW2d *524* (1959). Because the second conviction occurred after the effective date of the amendment, the charging of OUIL II was proper.

Hearsay rules. Defendant asserts the trial court violated the hearsay rules in that the arresting officer was permitted to testify that he was informed that the vehicle involved in the accident was registered to defendant. Defendant also asserts the court precluded defendant from offering the testimony of her mother, who was on the other end of the phone at the time of the

phone call referred to above, relating to defendant's then-

existing state of mind and emotional condition. Defendant asserts this was contrary to MRE 803(3) and directly lead to defendant's decision to testify.

First, defendant appears to argue that the police officer's testimony that he ran the license plate through and saw that it was registered to defendant was hearsay. Defendant further appears to assert that the records exception to hearsay does not apply, because the best evidence rule was not followed; i.e., the record itself was not produced. The best evidence rule only applies when the contents of a writing are in issue. People v Alexander, 112 Mich App 74, 76; 314 NW2d 801 (1981). Defendant does not assert that the car was not in fact registered to her. Further, the police officer was a reliable witness; the car was parked, with the license plate in full view. The Court is persuaded that even if admission were error, it was harmless error. The evidence in this case was overwhelming and the absence of showing defendant was the registrant of the vehicle would not have significantly impacted the People's case, given

defendant's intoxicated state and eyewitnesses, as well as defendant's on scene admission she was driving the vehicle and had been involved in an accident.

Next, defendant asserts the trial court erred in precluding defendant's mother from testifying as to defendant's state of mind on the day of the accident. In reply brief, defendant specifies that defendant talked with her mother at approximately 5:00 p.m., about two and a half hours before the accident. Defendant contends her mother should have been permitted to testify under MRE 803(3), pertaining to defendant's then existing mental, emotional or physical condition. The Court is not persuaded that MRE 803(3) applies here, where there was a significant period of time between the telephone call allegedly relaying defendant's state of mind, and the subsequent accident, after the ingestion of alcohol. The Court is persuaded that in

any event, any error was harmless, as again, the Court is not persuaded this omission prejudiced defendant's case.

Biased **juror.** Defendant indicates in her motion she is investigating the possibility that a juror was biased; the reply brief does not address the issue.

Admissibility of breath test results. Defendant alleges there was an inadequate foundation for the admissibility of breath test results, but does not provide any argument.

Conclusion. The Court has reviewed the entire record provided to the Court, and is persuaded there was an overwhelming amount of evidence presented at trial that defendant committed the crime for which she was convicted. The Court is further satisfied upon reviewing the sentencing transcript that the sentencing court committed no errors in its sentencing of defendant.

For the foregoing reasons, defendant's conviction and sentencing are AFFIRMED. Defendant's appeal is DISMISSED. In compliance with MCR 2.602(A)(3), the Court states this Opinion and Order resolves the last pending claim and closes this case.

IT IS SO ORDERED.

/s/
GEORGE E. MONTGOMERY
Circuit Court Judge

Dated: 10-1-02
cc: Dena Keller, Macomb County Prosecutor's Office

Gregory Zalecki

12900 Hall Road, Suite 415

Sterling Heights, MI 48313

APPENDIX C

Court of Appeals, State of Michigan

ORDER

Mark J. Cavanagh
Presiding Judge
Jessica R. Cooper
Pat M. Donofrio
Judges

People of MI v Debra Susan Gallagher

Docket No. 244437

LC No. 2002-001 036-AR

The Court orders that the application for leave to appeal is DENIED for lack of merit in the grounds presented.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on
Date Feb 12, 2003

/s/
Chief Clerk

/s/ [Presiding Judge]

Court of Appeals, State of Michigan

ORDER

Mark J. Cavanagh
Presiding Judge
Jessica R. Cooper
Pat M. Donofrio
Judges

People of MI v Debra Susan Gallagher

Docket No. 244437

LC No. 2002-001 036-AR

The Court orders that the motion for rehearing is DENIED

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on
Date April 2 2003

/s/
Chief Clerk

/s/ [Presiding Judge]

Michigan Supreme Court
Lansing, Michigan

Order
Entered: September 29,2003

Maura D. Comgan,
Chief justice

123733

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

V

DEBRA SUSAN GALLAGHER,
Defendant-Appellant.

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

SC: 123733
COA: 244437
Macomb CC: 2002-001036-AR

On order of the Court, the application for leave to appeal the February 12,2003 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

s0923

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.
September 29, 2003

/s/
Clerk